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EXPEDITED REVIEW
REQUESTED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of) PP Docket No. 93-253
Section 309(j) of the)
Communications Act -)
Competitive Bidding)
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JAN 13 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

TO: Chief, Wireless Telecommunications Bureau

PETITION FOR WAIVER

U.S. AirWaves Inc. ("AirWaves"), a qualified designated entity, hereby requests a narrowly-defined waiver of Section 1.2105(c) of the Commission's rules to the extent that such rule would prohibit AirWaves from entering into discussions with parties who are actively bidding in the Broadband PCS MTA auction currently in progress.¹ AirWaves further requests expeditious review of this Petition for Waiver so as to permit AirWaves to immediately discuss the provision of managerial and financial resources to small business applicants who are still participating in the MTA auctions. There is no alternative to obtaining a waiver of the anti-collusion rules which would permit AirWaves to assist other small bidders in the MTA auctions, and because of the unique circumstances leading AirWaves to request a waiver, the granting of such waiver would not undermine the Commission's rules restricting discussions among bidders.

¹ See 47 C.F.R. § 1.2105(c) (1995).

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- I. AirWaves' decision to file for, and then withdraw from, the MTA auctions is the result of unique circumstances.

AirWaves was incorporated on October 27, 1994 with a structure and financing plan designed to qualify it as a "small business" designated entity under Section 24.720 of the Commission's then-existing rules relating to the anticipated auction of the Broadband PCS "entrepreneurs' block" licenses. AirWaves' structure and financing were, and still are, important components of its primary strategy to become an active participant in the entrepreneurs' block auctions, and ultimately to be a significant player in the provision of PCS services on a nationwide basis.

With an interest in gaining some experience in the auction process, AirWaves identified a limited opportunity to participate in the broadband MTA auctions. AirWaves filed an FCC Form 175 for that auction on the filing deadline of October 28, 1994. As indicated in such filing, AirWaves' financing was not yet complete as of the filing date, but sufficient funding was anticipated to enable AirWaves to meet the deadline for making upfront payments on November 18, 1994. At the time of filing, a financial term sheet intended to serve as the basis for initial funding reflecting the then-existing strict limitations on non-qualified investor participation in the control group of a designated entity was circulating among AirWaves' anticipated

investors for final approval.

However, on November 10, 1994, the Commission announced a new and very different set of eligibility requirements for designated entities. Most significantly, the Commission liberalized the rules with respect to the structure, funding and investor participation in the control group.² The Fifth Memorandum Opinion and Order setting forth the new rules was not released until November 23, 1994 -- five days after the MTA application fee was due.³

Although the new rules greatly improve AirWaves' and other designated entities' ability to attract financing, the timing of their release interrupted AirWaves' attempts to raise the funds required to meet the November 18 application fee deadline for the MTA auctions. The necessity to consider the impact of these changes, re-circulate modified term sheets to interested investors and to amend AirWaves' organizational documents to reflect the liberalized ownership rules, without the benefit of the actual text of the rules, but at best based upon a

² Shortly thereafter, the Commission also clarified its rules distinguishing between bidders and applicants for purposes of its anti-collusion rules. *In the Matter of Implementation of Section 209(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Memorandum Opinion and Order* ¶ 8 et seq. (released November 17, 1994).

³ See *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order* (released November 23, 1994).

news release summarizing an order not yet released, were significant contributors to AirWaves' inability to solidify its financing in time to raise sufficient funds to cover the upfront payments for the MTA auctions due at the Commission on November 18. As a result, AirWaves withdrew from the MTA auctions.

AirWave's decision to withdraw was made entirely based upon its own circumstances and without regard to any other applicant's activities or circumstances. AirWaves did not, prior to applying, or between the time it applied and the time it chose not to make the upfront payment, engage in any discussions with any other applicant for the MTA licenses, or otherwise engage in any collusive behavior.

- II. AirWaves believes it can assist other small businesses in the MTA auctions, but is prohibited from doing so because the rules continue to treat AirWaves as an "applicant/bidder."

In addition to AirWaves, several other small businesses also filed an FCC Form 175 to participate in the MTA auctions. Some of these entities made their upfront payments and began participating in the auctions. Although as of Round 33 four of these small companies had already withdrawn from the bidding, a few are still actively bidding on a number of the smaller MTAs.

AirWaves believes it can be of substantial assistance to these bidders in strengthening their ability to bid in the MTA

auctions. By providing management and/or financial resources to one of these smaller entities, its chances of success in the MTA auctions in bidding against larger, well-funded companies and consortia will be greatly enhanced, and Congress' and the Commission's goals of increasing the ability of small businesses to participate in the PCS auctions will be equally well-served.⁴

Unfortunately, and despite AirWaves' early withdrawal from the MTA auctions for non-collusive reasons described above, the Commission's anti-collusion rules presently treat AirWaves as a bidding applicant. Because AirWaves applied for one or more of the markets in which these applicants are now bidding, without a waiver AirWaves would be prohibited from discussing and cooperating with the other small applicants prior to the conclusion of the auction.⁵

⁴ See 47 U.S.C. § 309(j)(3)(B) (1995); *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order* ¶ 12 (released July 15, 1994).

⁵ See 47 C.F.R. § 1.2105(c)(1) (1995) ("all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies..."); see also *In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Fourth Memorandum Opinion and Order* ¶ 51 (released October 19, 1994) ("the fact that one bidder has withdrawn its application before entering into a consortium with another bidder does not reduce the importance of our collusion rules...").

Clearly, however, the Commission's concerns with respect to active bidders collaborating with former bidders are not manifest in the case of AirWave's application and withdrawal from the MTA auctions. Although the Commission's rules justifiably seek to prevent collusion among bidders, even after one has withdrawn, the reasonable concerns of the Commission in establishing this general rule are not exhibited in the circumstances surrounding AirWaves' application and withdrawal from the MTA auctions. On the contrary, the unique circumstances surrounding AirWaves' withdrawal, and the opportunity to permit AirWaves to further the ability of small entities to succeed in the MTA auctions, support granting a waiver of the anti-collusion rules.

The Commission has expressed concern that entities may file applications "solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal."⁶ As described above, however, AirWaves filed an application with the reasonable expectation of participating in the MTA auctions; the withdrawal of the application before the start of the auctions was caused to a large degree by the unusual timing of the changed regulations that would affect the ownership structure, and thus financing of designated entities, including AirWaves. Furthermore, AirWaves has neither received nor

⁶ *Id.* at ¶ 50.

demanded payment from any entity in connection with its withdrawal; indeed, AirWaves has not had any discussions of such nature with any applicant for the MTA licenses. AirWaves instead seeks to assist other small entities in the MTA auctions through the possible contribution of financial or managerial resources.

The Commission has also expressed concern that large bidders may offer small bidders consortium arrangements during the course of an auction and thereby exert pressure on such small bidders to withdraw.⁷ This is not the case here. AirWaves, though a small entity, withdrew prior to commencement of the auctions, without any previous discussions with large or small entities with respect to its withdrawal, and without receiving any benefit from withdrawal. Although AirWaves now seeks to assist other small entities in bidding for MTA licenses, its decision to do so was not predicated on a promise, or even a hope, of obtaining a consortium or other arrangement with an entity by virtue of its withdrawal.

Permitting AirWaves to contribute financial or managerial resources to other small entities presently bidding in the MTA auctions will further the goals of Congress and the Commission of increasing the ability of small entities to participate in the PCS auctions. Indeed, the Commission has recognized that there is substantial benefit to allowing active

⁷ *Id.* at ¶ 51.

bidders to continue soliciting additional resources during an auction to respond to higher than anticipated bid prices.⁸ In expressly modifying its generic auction rules and for the Broadband PCS auctions, the Commission has noted that so long as control of an applicant does not change, bidders may have discussions with other bidders who are not applying for the same markets or with anyone who is not an applicant.⁹ In this case, AirWaves merely seeks to be placed in the status of a non-applicant to reflect that its ability to participate in the auction and its decision to withdraw were the result of unique difficulties, for which it should not be as severely prejudiced as the rules currently require.

III. No alternative is available to a waiver of the Commission's anti-collusion rules, and because of the increasing financial demands on bidders in the MTA auctions, expeditious review is critical.

Because the Commission's rules and orders expressly treat AirWaves as an active bidder in the presently-active broadband MTA auctions, despite its non-collusive withdrawal before the start of the auctions, there is no alternative to obtaining a waiver of such rules before AirWaves may assist other small bidders. Clearly, AirWaves' unique circumstances contributing to the withdrawal of its own application from the

⁸ Id. at ¶ 55.

⁹ See Id.

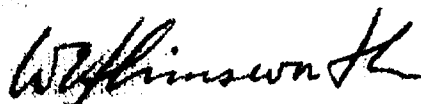
MTA auctions do not provide a basis upon which applicants may generally rely to avoid the intent of the anti-collusion rules in any future waiver requests. Furthermore, good cause exists for the grant of this waiver in that to do so will allow AirWaves to engage in discussions designed to assist one of the remaining small business applicants in successfully obtaining an MTA license.

The precipitous pace of the broadband MTA auctions necessitates **immediate and expeditious** action on this Petition for Waiver. Failure to act promptly could lead to the withdrawal (for lack of needed resources) of one or more of the remaining small business entities which may have otherwise been successful with the assistance of AirWaves. Given that the public interest would be better served by encouraging small businesses' participation in the MTA auctions, and also by allowing AirWaves an opportunity to potentially increase the available resources of such small businesses, expeditious consideration and action on this request is clearly warranted.

WHEREFORE, U.S. AirWaves Inc. hereby requests waiver of Section 1.2105(c) to the extent necessary to allow it to engage in discussions and negotiations with other active bidders in the MTA auctions, notwithstanding that it was an applicant for one or more of the same markets in which those active bidders are currently eligible to bid.

Respectfully submitted,

U.S. AIRWAVES INC.



By: Winston Himsworth
Its: Director